NO. 2739

United States

Circuit Court of Appeals

For the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,
vs.
ESTHER ROMI PENSO and BENSOIR PENSO, by his Guardian Ad Litem LEON BENEZRA,
Defendants in Error.

Brief of Plaintiff in Error

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STATEMENT OF PLEADINGS.

This suit was originally brought in the Superior Court of the State of Washington, for Chehalis County, on or about April 15, 1914, and upon motion of the plaintiff in error was removed to the United States District Court, Western District of Washington, Southern Division. The plaintiffs were the defendants in error here. After the case was removed to the United States Court the complaint was twice amended, and the cause came on finally for trial on plaintiffs' second amended complaint, which in substance alleged:

That on the 11th day of April, 1914, Bensoir Penso was a minor eleven years old; that Leon Benezra is the duly appointed, qualified and acting Guardian Ad Litem of the person and estate of the said minor, and as such Guardian is authorized to maintain the suit on behalf of the minor; that the other plaintiff, Esther Romi Penso, was the wife of Haim Jack Penso, and that the above mentioned minor is the son of Haim Jack Penso; that the defendant is a corporation engaged in the operation of railway lines in the State of Washington and elsewhere.

That on or about November 4, 1913, at about the hour of 6 o'clock P. M., the said Haim Jack Penso was returning from his place of work in East Hoquiam to his home in West Hoquiam; that it was his custom and that of his fellow workmen to cross over the Hoquiam River on the railroad bridge, which latter was used as a common passage-way by Penso and many others with the knowledge and consent of the defendant, and that such practice had continued for a good many years; that when the said Penso reached a point near the middle of the bridge he was met by a gasoline motor car operated by the defendant; that such car was being operated at a high and unusual rate of speed and was carelessly and negligently driven upon the said Penso, and the latter was knocked from the said bridge into the waters of the Hoquiam River, as a result of which he was killed; that although the said Penso was in plain view of

those operating the car for a distance of several hundred feet from the point where he was struck, and those operating the car could plainly have seen his position of danger, they did not heed the same and carelessly drove the car against him; that the deceased was an able-bodied man, earning and capable of earning $2.50 per day; that the plaintiffs have been damaged in the sum of $20,000.

The answer denied that the bridge was commonly used by foot passengers with the knowledge and consent of the defendant, and that such practice had continued for years; denied that the deceased, Haim Jack Penso, was injured because of any negligence of the defendant, and denied that the defendant's motor car was, at the time mentioned in the complaint, operated in a careless manner or at a high or unusual rate of speed, and denied that the plaintiffs had been damaged in any sum whatsoever, and it denied, upon information and belief, all other allegations of the second amended complaint. In other words, it was a denial of practically every material allegation of the complaint.

The answer set up two affirmative defenses. The first one was contributory negligence on the part of the deceased Penso, and the second set up that the deceased knew and appreciated the dangers in undertaking to cross the bridge and assumed all the risk attendant upon so doing.

There was one verdict for $2500 in favor of the plaintiffs, upon which verdict a judgement was entered.

STATEMENT OF THE TESTIMONY.

The Hoquiam River runs through the City of Hoquiam and divides it into what may be termed East Hoquiam and West Hoquiam. West Hoquiam is the main portion of the City, but there are a number of large manufacturing plants in East Hoquiam. Many of the employes in these plants live in West Hoquiam. Two bridges span the Hoquiam River, one being the railroad bridge mentioned in the complaint, and the other being a wagon bridge located some distance above the railroad bridge. (R. p. 41). For a number of years it has been the practice of persons employed in the mills in East Hoquiam to walk over the railroad bridge, particularly in going from work at night. Not very many laborers crossed over this bridge when going to work, but they crossed over the wagon bridge. (R. p. 25, 28, 42, 47, 58, 68, 70, 72, 74). Two or three hundred people would probably cross over this bridge each day. (R. p. 25). As many as a hundred people have been seen on the bridge at one time, preparing to cross. (R. p. 25, 58). The defendant's employes had for a long time known that such use had been made of the bridge. (R. p. 47, 54). The deceased, Haim Jack Penso, for a long while had been in the habit of crossing the bridge at the close of work day. (R. p. 40).

The Hoquiam River is an important navigable stream and a good many boats pass through the railroad draw bridge each day. In order to let these

boats pass it is necessary to turn the draw span of the bridge. (R. p. 32, 33).

This is a large, heavy steel bridge, the draw span being 300 feet in length. (R. p. 32, 36). At each end of the draw span there is a platform large enough for a number of men to stand at the side of the track. Stairways lead from the ground below up to these platforms. There is also a platform in the center of the bridge. (R. p. 28, 29, 34, 47, 68, 70, 72). There is a bridge tender's house located about the center of the bridge and high above any passing trains. The draw span is operated from this house. (R. p. 75). There are various plates and girders upon which a man could get and be out of danger of a passing train. (R. p. 39, 42, 54, 56, 57, 58, 60, 70, 71, 72, 74). The manner of construction of this bridge, as well also as the platform, girders, plates, etc., are shown much more distinctly in the numerous photographs offered as exhibits and now a part of the record, than we can here describe. We particularly call attention to Plaintiff's Exhibit 5, 6, 7, and Defendants' Exhibits C, D, H. Many times have men, while on the drawn span, been met by trains crossing the bridge, and they have always succeeded in getting out of a place of danger by getting onto some of the platforms of the bridge, or by stepping upon some of the plates or girders, or standing with the feet on the ends of the ties and leaning against the steel upright pieces. (R. p. 42, 54, 56, 57, 58, 60, 70, 71, 72, 74). In all the years while it has been a practice for men

to cross over this bridge, the deceased was the first person to be injured by a train, (R. p. 72), if he was in fact injured by the car in question.

There is a long, high pile trestle forming a part of the railroad track, leading up to each the west and east end of the draw span of the bridge. Where the trestle connects with either end of the draw the elevation above the ground below is about seven feet. (R. p. 26, 28). These trestles reduce in height from the bridge approach. There is a fairly steep grade, particularly of the trestle leading up to the west approach to the draw span. (R. p. 31, 32).

All of the trains of three transcontinental railroads, to-wit, the plaintiff in error, the Northern Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company, pass over this bridge. (R. p. 33). In the neighborhood of thirty-five to forty trains, of all descriptions, pass over this bridge each twenty-four hours (R. p. 33, 75, 76); among others, there was the gasoline motor car alleged in the complaint. It was a large, heavy car. (R. p. 43, 51). It was equipped with a strong headlight, a whistle and a bell. (R. p. 50, 51, 52). This car operated exclusively between Hoquiam and Montesano, which latter place is about fifteen miles to the east of Hoquiam. (R. p. 48, 63). It generally made two round trips per day. (R. p. 63). For at least several weeks immediately prior to the injury, and at the time of the injury, its schedule provided that it should leave the

Hoquiam station in West Hoquiam, at 6 o'clock P. M. (R. p. 45, 59, 63). The Hoquiam station is in West Hoquiam and is about eight or ten common city blocks west of the west approach of this bridge. (R. p. 32).

For a distance of approximately three hundred feet west from the west end of the draw span, the track is perfectly straight, and when at night an engine coming from west reaches this straight track, the headlight will show straight into and completely through and beyond the bridge (R. p. 30, 33, 34, 59, 66. See also various photographs).

The deceased was working at the Coats Shingle mill in East Hoquiam, which mill is located about a quarter or half a mile east of the draw bridge, and it takes ten or fifteen minutes to walk from the Coats mill to the bridge. (R. p. 15, 37, 38). On November 4, 1913, the deceased and a man working with him at the Coats mill, stopped work about ten or fifteen minutes of six o'clock in the evening, and they started towards the bridge, walking along the railroad track and trestle leading to the bridge. (R. p. 37, 38). It was dark and raining. (R. p. 38, 42, 67, 52). The deceased was very near the west end of the bridge when the motor car came on that end of the bridge (R. p. 39, 40, 48, 54, 61), and the deceased, at the time he was hit by the motor car, or, if, he was not hit, fell off the bridge, was within a few feet of the west end of the bridge. (R. p. 39, 40, 48, 54, 61).

The motor car was running at the rate of about six miles an hour from the time it left the station in West Hoquiam, until it came upon the bridge. (R. p. 47, 48, 67, 69). The motorman was at his lookout window. (R. p. 48, 49). The car was stopped as soon as possible. (R. p. 48, 49, 55, 59, 68, 69). When the car had come to a stop about one-half of it was on the draw span and the other half on the west approach. (R. p. 55, 67, 69). The deceased was at about the middle of the bridge when he saw the headlight on the car. (R. p. 38, 39, 40).

The deceased did not talk or write English. (R. p. 23, 24, 43). He was a foreigner and lived near Constantinople. (R. p. 23). He was approximately 39 years of age. (R. p. 21). He had been in this country about six years. (R. p. 21). He left a wife and minor child in the Old Country. (R. p. 21, 22, 23). He had never become a naturalized citizen of the United States. (R. p. 23). His son was at the time of his death a minor, (R. p. 23). Sometime subsequent to his death his body was found. (R. p. 43, 44).

The foregoing facts are practically undisputed and nearly all of such facts came out in the plaintiffs' testimony.

There were but three eye witnesses to the accident, one of which testified for the plaintiffs and the other two for the defendant, one of defendant's eye witnesses being the motorman in charge of the gas car.

The plaintiffs' eye witness was named Theo. Balabanas, and, briefly speaking, he testified that he and deceased had worked together about a year at the Coats Shingle mill before the deceased's death; that he and deceased had many times crossed this railroad bridge; that while they were working at the Coats Shingle mill they crossed it every night; that they left the Coats mill at about fifteen minutes to six; that deceased was hurt on the bridge—was knocked down by the car. They were at about the middle of the bridge when they saw the car coming; that the deceased was walking a little ahead of the witness. Witness saw the headlight on the approaching car, but did not hear any whistle or bell ringing; that witness, when he saw the car coming, got into a place of safety by leaning over on one of the iron posts of the bridge. After witness saw the light of the car, he saw deceased running towards the west end of the bridge; he did not see the car hit deceased; he and deceased had walked over the bridge every night for about a year. (R. p. 37, 38, 39, 40).

One of defendant's eye witnesses was named Louis H. Luckey. He had walked over this bridge many times, and met trains on it, and he would always get out of the way. He walked over the bridge behind the deceased. He saw the headlight of the car approaching the bridge. He saw a man ahead of him, walking in the middle of the track, but he did not see the car hit the man. He saw the man, whom he supposed was deceased, walking right to-

wards the west end of the bridge, and until he got close to the car, and after that he did not see him. The bell on the car was ringing all the time and even when the car stopped. (R. p. 57, 58, 59, 60, 61, 62.)

The other eye witness was J. Hendricks, the motorman of the car. He testified that he left the Hoquiam station on schedule time, at six o'clock, and that, as was his custom, he started the bell ringing when he left the station and that it continued to ring until after the car was stopped on the bridge; that the bell will ring automatically; that it is an automatic air bell; that as he approached the bridge he sounded the whistle. He knew that people were liable to be crossing the bridge and was on the look-out; that the headlight was burning brightly and showed through the bridge. He observed a man on the bridge approaching the car in the ordinary way. At that time the man was in the center of the track and about three hundred feet from the car. He did not know deceased, but believed the man whom he saw was deceased; that the man stepped off to one side, into a place of safety, and just as the car came onto the west end of the draw bridge, the man suddenly jumped in front of the car, and the witness thought that he might have hit the man and stopped his car as soon as possible—stopped the car within ten or fifteen feet. Witness said that the man was leaning up against one of the bridge pillars and was in a place of safety until he left that place and

jumped in front of or to the side of the car. Witness could see clear through the bridge before the car had reached the westerly approach. He saw this man on the bridge when the car was about three hundred feet away from the west end of the bridge. He saw only one man. He did not know whether the car hit the deceased. (R. p. 45, 46, 47, 48, 49, 53, 54, 55, 56).

We have here only undertaken to give the substance of the testimony of these three eye witnesses, insofar as their testimony related to things which they saw and did. We will later refer more particularly to the testimony of these three witnesses.

At the close of plaintiffs' testimony the defendant moved for a dismissal of the case for want of sufficient evidence which motion the court denied, and exceptions thereto were taken by defendant.

At the close of all the testimony the defendant moved for a directed verdict for the defendant, which motion the court refused, and exceptions were taken.

ASSIGNMENTS OF ERROR.

The plaintiff in error claims the following assignments of error upon which it will rely:

1.

The court erred in overruling, at the close of plaintiffs' testimony, the motion for dismissal of the case for want of sufficient evidence, which motion was based upon the ground that the evidence was insufficient to show negligence on the part of the de-

fendant company, and also upon the ground that the evidence showed that the deceased was guilty of contributory negligence.

2.

The court erred in refusing to give instruction No. 1, at the request of defendant, which instruction is as follows: "You are instructed to return a verdict in this case for the defendant. Under the testimony the evidence does not justify a rendition of a verdict against the defendant."

3.

The court erred in refusing to give instruction No. 2, at the request of the defendant, which instruction is as follows: "You are instructed that you cannot return a verdict in favor of Esther Romi Penso, widow of the alleged deceased, in any event."

4.

The court erred in refusing to give instruction No. 3, at the request of defendant, which instruction is as follows: "You are instructed that as to the plaintiff Bensoir Penso, the alleged minor, you cannot return any verdict in his favor for any damages whatsoever, nor in favor of his guardian ad litem. The evidence is insufficient to justify any verdict of the jury in his favor, or any allowance of damages in connection therewith."

5.

The court erred in refusing to give instruction

No. 4, at the request of the defendant, which instruction is as follows: "In view of the fact that all the testimony discloses that the engine in question was lighted by a headlight that could be seen for a long distance you are instructed that the question whether the bell was rung or not on the car just prior to the accident is immaterial in this case and you cannot find any negligence based upon the fact that the bell was not rung."

6.

The court erred in refusing to give instruction No. 12, at the request of the defendant, which instruction is as follows: "You are instructed that the fact that the party claimed to have been killed, for a long period of time prior to the accident traveled in the morning to his work over a right of way bridge across the river at some distance from where this railroad bridge was operated is a circumstance which you should consider in determining whether the alleged deceased was guilty of contributory negligence. The testimony discloses that he could go to his work, and did go to his work in the morning by a route over which there were no trains operated, and this being so you have a right to take this circumstance into consideration in determining whether he was guilty of contributory negligence in going upon the bridge where it is claimed he was killed."

7.

The court erred in refusing to give instruction

No. 20, at the request of the defendant, which instruction is as follows: "If you believe from the evidence that it was dangerous to undertake to cross over the said bridge at the same time a car or train was crossing over the same and you further believe that the deceased, immediately prior to going on said bridge, knew or by the exercise of reasonable care should have known that he would meet the said motor car or other car or trains on such bridge, if he undertook to cross the same at the time he did undertake to cross, then the deceased would be guilty of such contributory negligence and assumption of risk as would defeat any recovery for the plaintiffs herein, and under those circumstances your verdict must be for the defendant."

8.

The court erred in giving to the jury the following instructions: "The order in which you would naturally take up the consideration of these issues would be, first, to determine what, if any, relationship this boy and this woman bear to the deceased. If there is a fair preponderance of the evidence that one was wife and is today the widow, and that the other was the son, then the next step would be logically to determine whether the deceased contributed in any way proximately to his own death, by his own negligence." For the reason that no damages could be awarded to the minor, and also that damages could not be united in one verdict for both plaintiffs jointly.

9.

The court erred in giving the jury the following instructions: "If you find that the defendant was so negligent, by a fair preponderance of the evidence, you would then pass to what recovery should be awarded the plaintiffs in this case. In assessing the amount of recovery, you would not be influenced by any sentimental consideration, and you would not allow any damage for merely grief, or injury to the feelings which may have resulted from the loss of the parent, but you would confine your verdict to such an amount as would fairly compensate the plaintiffs in this cause for the death of the deceased Penso." For the reason that no damages would be awarded to the plaintiffs in any event under the proof in this case, and also that damages could not be united in one verdict for both plaintiffs jointly.

10.

The court erred in rendering judgment in the case in favor of the plaintiffs.

ARGUMENT AND AUTHORITIES.

I.

Insufficiency of the Evidence.

At the close of the plaintiffs' testimony the defendant moved the court for a dismissal of the action as to each and both of the plaintiffs, on the ground that there was insufficient evidience to permit the plaintiffs, or either of them, to recover.

This motion should have been granted by the court upon at least two grounds: (1) for the reason that the plaintiff's testimony wholly failed to show any negligence upon the part of the defendant; (2) because the plaintiffs' testimony plainly showed that the deceased was guilty of contributory negligence.

As we have stated before, the plaintiffs had but one eye witness, and necessarily their right to recover must depend very much upon the testimony of that witness. That the court may more conveniently review this question, we will here quote all the testimony in the record of this eye witness, insofar as it pertains to what the witness saw or heard. The witness was named Theo. Balabanas and his testimony will be found on pages 37 to 41, both inclusive, of the record.

This witness testified: That he and the deceased worked together at the Coats Shingle mill; that witness and the deceased left the factory together on the day the deceased was killed, at a quarter to six o'clock. They worked together. Witness had crossed over this railroad bridge many times; that while working at the Coats Shingle mill he crossed the bridge every night; that he and the deceased had been working at the Coats mill for about a year, and that every night during that time they crossed over this bridge; that in going to work in the morning the witness used the wagon bridge; that witness had not previously met a car or train on the railroad bridge, but that he had seen the motor

car at the depot. He did not know when the car left for Montesano. That he and the deceased, on the night of the accident, quit work at a quarter to six o'clock.

The remainder of his testimony is concerning the manner of the accident and is quoted from the record as follows:

> "He and deceased, on the evening of the accident, left the mill at a quarter to six and were on the bridge at six o'clock. It took fifteen minutes to walk from the mill to the bridge. It was a fairly dark night and was raining a little. Deceased was hurt on the bridge. Knocked down by the car. He was struck and then his body went down and witness did not see his body.
>
> Witness and deceased was going towards the bridge when deceased was struck by the car, and towards town. It was a gasoline car which goes to Montesano that struck him. When crossing the bridge deceased and witness were walking together. At the time deceased was struck by the car witness stopped to roll a cigarette and Penso went on ahead. They were in the middle of the bridge when the car was approaching. That when walking across the bridge there were planks that they walked on, and were going towards Hoquiam. That witness did not know when the car was coming, but he and deceased were passing on the bridge every night. They were crossing the bridge every night. Witness did not know whether the car would cross the bridge at that time or not. The witness did not hear any whistle from the car. Did not hear any bell ringing. That the way he knew the car was coming was when he stopped to roll his cig-

arette and deceased passed a few steps ahead, then the car passed right ahead. That when witness saw the car he started to walk and when deceased was struck witness went over and dropped on to an iron post on the bridge. That he got over to the iron post by stepping on the rail and then putting his hand upon the post. Witness then pointed out the post on Plaintiff's Exhibit 7, which he got hold of, saying it was the post right in the middle of the bridge. Witness then pointed out and marked the post on Plaintiff's Exhibit 7, which he got hold of, pointing to the upright post nearest the west end of the bridge on the up-river side. That as the witness stopped deceased was right on the step, and deceased was struck by the car and then the passengers and some of the brakemen came down with ladders and were looking for the body and they only found his dinner pail.

That witness stepped over and put his hand around the post and stopped there. Asked how soon he did that after he saw the light of the car, he answered it was about 24 feet. That after the witness saw the light of the car and before he moved to the post he put his arms around. Witness had walked four or five feet after he saw the car coming, then he put his hands around the post and stayed there, and then came down again. When the deceased was struck witness dropped the post.

That there was no place deceased could have gotten off the bridge, excepting the platform that deceased was going towards, after the car was seen. That there was no other room or platform, excepting the stairs. That Penso was killed, but that he did not see him. After witness saw the light of the car deceased was running to

cross the steps and as he tried to cross the steps deceased was knocked down by the car. Deceased was trying to put his feet on the stairs when he was struck by the car. He meant by the stairs, on the platform. Right on the platform. That one of the feet of deceased was on the rail and one on the platform. That after witness saw the light of the car there was no place deceased could have gotten to as a place of safety, excepting the platform towards which he was running. That as to why there was not any other place he did not know. There were only a few boards inside the rails and no other room at all. That deceased could not have stepped off on the side like witness did because deceased was ahead, right close to the stairs. That there was no place on the side of the bridge where deceased could have got hold of before getting to the platform. That he did not know how many minutes it was after witness saw the light on the car until deceased was struck by the car, but that he did know that deceased was running to get to a place of safety."

1. WAS THE DEFENDANT NEGLIGENT?

We are wholly unable to find any testimony in the record which even tends to show that the defendant was guilty of any negligence causing this injury. Its car was in first class repair and running condition. It had a strong headlight, which was burning. The plaintiffs did not introduce a word of testimony concerning the speed of the car at any place between the station and the bridge. It was shown that the defendant knew that laborers were in the habit of crossing this bridge. Therefore, in the absence of any showing to the contrary, we have a right to assume,

and do assume, that the car was running at a proper and reasonable speed. There is nothing in the plaintiffs' testimony to indicate that the motorman was not at his proper place in the car and keeping a lookout; therefore we have a right to assume, and do assume, that the motorman was properly performing his duty. The court will not assume, simply because an accident happened, that the defendant's employes were guilty of any negligence, but, on the contrary, will assume that they were not guilty of negligence. It is true that plaintiff's one eye witness testified that he did not hear the bell or whistle. That would hardly be proof sufficient, however, that they were not sounded upon approaching the bridge. It will be observed that no witness for the plaintiffs testified that the bell was not ringing and the whistle was not sounded. But even if it should be conceded that the proof shows that the bell was not ringing and the whistle was not sounded, yet that would not be any proof of negligence, because the only purpose, of course, in giving such signals, was to warn concerning the approach of the car. The plaintiffs' testimony showed that the headlight on the car shone distinctly clear through the bridge when the car was at a point approximately three hundred feet west of the west end of the draw span. The deceased must consequently have seen the headlight and had just as much knowledge concerning the approach of the car as if the bell had been rung and the whistle sounded.

The only possible argument that the testimony

shows negligence of defendant's employes, would be the argument that the motorman could and should have seen the deceased in time to have stopped his car before the accident. But this ground cannot be maintained under the evidence. Certainly the deceased was in as good a position to see the approach of the car as the motorman was to see the deceased. The lower court properly stated the law when it instructed the jury that the law does not require a railroad company to stop its trains simply because there are persons upon its tracks, and that the mere fact that a person is seen walking in front of a train does not, as a matter of law, require that the train should be brought to a stop, because it is the duty of the person so walking to step out of the way of the train, and the train crew has a perfect right to anticipate that the person will step off the track, unless the train crew knows that the conditions are such that the person walking on the track will not or may not be able to get out of the way.

So in this case, if it be conceded that the motorman saw or should have seen the deceased on the bridge and approaching the car, there was no duty on his part to stop the car for that reason, because he had the right to persume, until the contrary should appear, that the deceased would get on the side of the bridge and thus get out of the way. There is absolutely nothing in the plaintiffs' testimony which even tends to show that the motorman should have known that the deceased was in a place of danger

from which he probably could not extricate himself. It is true this eye witness said that after he saw the light of the car, which was at the time when he was near the middle of the bridge, there was no place deceased could have gotten to as a place of safety, but this portion of the witness' testimony is so fully overcome by other testimony of the plaintiffs, that it is manifestly wrong. Nearly every witness the plaintiffs had upon the stand, and nearly every witness the defendant had on the stand, testified that for years men have been in the habit of getting out of the way of trains at any place on the bridge. The photographs show also conclusively that there were a number of ways whereby the deceased could have gotten out of the way of the train. This eye witness' own testimony directly contradicts his statement that there was no place where the deceased could have gotten out of the way, because the witness states that he himself got out of the way of the train by leaning up against the post or upright part of the bridge nearest the west end of the bridge, and consequently very close to where the deceased was injured. It must follow, therefore, that if it be conceded that the motorman saw or should have seen the deceased, there is absolutely nothing in the testimony to indicate that the motorman knew or should have known or suspicioned that the deceased could not and would not get into a place of safety. There is nothing in the plaintiff's testimony which even tends to indicate that the motorman did not stop his car as soon

as possible upon learning that there was danger of the deceased getting hurt; on the contrary, the plaintiffs' testimony shows that the car was stopped immediately at the west end of the draw span.

To hold that, under the circumstances of this case, it was the duty of the motorman to have stopped his car before coming on to the draw span, would be equal to holding that the defendant would be required to stop and hold all of its trains until the hundreds of people who daily cross this bridge have safely gotten across. The law does not impose any such obligation. While the deceased probably was not a trespasser, yet he was nothing more than a licensee—he was crossing the bridge for his own convenience and a greater duty rested upon him than if he had been invited by the Railroad Company to use the bridge.

2. CONTRIBUTORY NEGLIGENCE.

As a part of its motion for a dismissal of the case the defendant contended that the plaintiffs' evidence showed that deceased was guilty of such contributory negligence as to defeat the action.

In examining this question we find that the deceased had been walking over this bridge every night for a year or more and that the place where he worked was close to the railroad track. He necessarily knew all about this bridge and all the dangers incident to walking across the same. He knew that all the railroad trains operating in and out of Hoquiam

must of necessity pass over it. He knew that a train was liable to cross the bridge at almost any moment. Inasmuch as the scheduled time for the Hoquiam-Montesano gas car to leave Hoquiam was six o'clock, and such had been the schedule for a number of weeks at least immediately prior to the injury, it is fair to presume that the deceased knew of the schedule of this motor car, and we believe it is likewise fair to presume that he must have met the car on the bridge at times prior to the date of his injury. No man could have been more conversant with this bridge and its dangers and the places it afforded for persons to get out of the way of trains, than the deceased. He knew that at the easterly end of the draw span there was a platform upon which he could stand and be in perfect safety. He also know that in the middle of the bridge there was another platform upon which he could stand and be in a perfectly safe place. He also knew that there was a similar platform at the extreme westerly end of the bridge. He knew that if he met a train on the bridge he could lean up against some of the steel upright pieces and get out of harm's way.

With such knowledge we find that the deceased must have come on to the easterly end of the bridge a considerable time after the motor car had left the Hoquiam station. According to the testimony of plaintiffs' only eye witness, the deceased was at about the middle of the bridge when he first saw the headlight of the coming car, at which time the car

would have been about three hundred feet to the west of the west end of the bridge. It must be remembered that all of the testimony shows that when the car got within approximately three hundred feet of the west end of the bridge the strong headlight shone upon and completely through and beyond the bridge. All the testimony concedes that the accident happened very close to the west end of the bridge. Under these circumstances the car would have a little more than three hundred feet to go while the deceased was traveling less than half the length of the bridge or a little less than one hundred and fifty feet. All the testimony shows that the car at that time was going at the rate of about six to eight miles an hour. Under these circumstances it is inconceivable why the deceased did not get on the platform in the center of the bridge and wait for the car to pass him, or if he did not choose to get on the platform, he had more than ample time to have gotten down on some of the plates or against some of the girders of the bridge, so that he would have been entirely out of the way. This is what everybody else before him had done under like circumstances, and this is what his partner, the plaintiffs' eye witness, did. But the deceased was evidently content to take his chances in beating the car to the westerly end of the bridge. This eye witness also undertook to get across ahead of the car, and, as a matter of fact, succeeded in getting within some twenty or twenty-five feet of the westerly end of the bridge.

He himself testifies, as shown on Plaintiffs' Exhibit 7, that he leaned up against "the upright post nearest the west end of the bridge on the up-river side." This witness further testified that after he "saw the light of the car deceased was running to cross the steps and as he tried to cross the steps deceased was knocked down by the car. Deceased was trying to put his feet on the stairs when he was struck by the car. He meant by the stairs, on the platform." In other words, the testimony of this eye witness shows, and all of the circumstances show, that the deceased, knowing that the car was close by, negligently and carelessly and in total disregard of his safety undertook to beat the car to the end of the bridge at a time when he had ample opportunity to have gotten on to the platform at the middle of the bridge, or to have done as his associate did, lean up against an upright pillar, or gotten down on some of the plates or girders and have been in a perfectly safe place.

Even if the facts were that there had been no place on the bridge whereby the deceased could have gotten out of harm's way, certainly ordinary care on his part would have required that when he saw the car coming he should have gone in the opposite direction, in an effort to get off the bridge, rather than go in the direction which would compel him to meet the car. It seems to us that the deceased did everything which, under the circumstances, an ordinarily prudent man would not have done.

In the case of Texas Midland R. Co. v. Byrd, 115 S. W. (Tex.) 1163, the facts showed that a person met a train on a railroad bridge about two hundred feet in length, and that people had been in the habit, with the knowledge of the Railroad Company, of walking across this bridge. The court said:

> "Giving all the effect of implied license to use the bridge as is claimed for it in this case, it could hardly be said that it implied a license to use the structure to the obstruction of the defendant's business. Persons found on the track of the road would necessarily interfere with the free use of its track by the defendant company, for if his peril was discovered, the Company would be compelled, in order to avoid injuring him, to stop its train in toto until he had placed himself in a place of safety. We think that the doctrine upon which the license of the Railroad Company is implied, by the use which persons put to it by using it as a foot-path, has been pushed far enough in this state, and we are not inclined to let it go any further. We are clearly of the opinion that the defendant was guilty of contributory negilgence in going upon the trestle where he was in danger of being struck by a train or being forced to jump and injure himself."

So in the case at bar, either this bridge was reasonably safe for foot passengers to walk over it, or it was unsafe for that purpose. If there was no way whereby a foot passenger could get out of danger, upon meeting a train, then it must follow that it would be the heighth of negligence for any person to undertake to walk across the bridge when there was any reasonable chance of meeting a railroad

train. If, on the contrary, (as the evidence quite conclusively shows) there were places whereby the person walking across the bridge could get out of harm's way, then it certainly was the duty of the deceased, in this instance, to have gotten into a place of safety. In either event he would be guilty of negligence; in the one instance for undertaking to walk across the bridge at all, and in the other for not getting into a place of safety when he knew that a train was approaching the bridge.

In the case of Goudreau v. Conn. Co., 80 Atl. Rep., 281, the suit was one for damages where a person walking over a bridge was met by a train and killed. The court, after disposing of other questions, said:

> "Again, if the motorman had seen Goudreau sooner than he did, it cannot reasonably be said that he was negligent in not anticipating that Goudreau would run directly toward the car, instead of away from it, or instead of seeking safety on the platform which was near him when he first saw the car."

In the case of N. P. Ry Co. v. Jones, 144 Fed., 47, being a case out of this court, it was said:

> "Conceding that the defendant in error was a licensee, and that all trains and locomotives should have been moved upon said track with proper regard for his safety, the most that can be said of the duty of the railroad company in that regard is that it was bound to use reasonable caution to avoid injuring him. * * * A gen-

eral license to the public to walk upon a railroad track does not mean that the railroad company is to be the insurer of the safety of all persons who avail themselves of that permission. While the license adds to the responsibilities of the railroad company, and imposes upon it a greater burden of care, it does not affect the duty that rests upon the licensee to take all due precautions to avoid injury to himself."

In the case of Brown v. St. Louis etc. R. Co., 55 So., 107, it was held that where a person, after finding himself in a place of danger upon a railroad trestle, and in danger of being run over by an approaching train, runs alongside the trestle and on the track, towards the approaching engine, until too late for the defendant's servants in charge of the engine to avoid the injury, he is guilty of contributory negligence.

A railroad engineer need not slacken speed merely upon seeing a pedestrian upon the track, but may assume that he will use his faculties for his own safety and leave the track in time to avoid injury. Talley v. So. Ry. Co., 80 S. E., 44.

Where plaintiff, a permissive licensee, used defendant's railroad track, which he knew consisted of a trestle over a part of the public street, he was negligent, where there was another and safe way leading to his home, but a little longer. Holt v. Texas Midland R. Co. 160 S. W., 327.

The principles of law applicable to the facts in

this case are so simple and universally recognized by the courts, that it seems to us unnecessary to make any further citation of authorities.

II.

THE COURT SHOULD HAVE INSTRUCTED A VERDICT FOR DEFENDANT.

At the close of all the testimony in the case the defendant moved the court to instruct the jury to return its verdict in favor of the defendant, and defendant also in writing requested the court to instruct the jury to return a verdict in its favor.

The plaintiffs did not undertake to offer any testimony concerning the speed of the car at and before the accident, or to indicate whether the motorman was on the lookout, or as to whether he saw the deceased, or as to any efforts upon his part to stop his car. But the defendant introduced the testimony of the motorman, and of another eye witness named Luckey touching these and other points.

The motorman testified that his car left the Hoquiam station on schedule time, at 6 o'clock; that when the car was leaving the station he started the bell ringing; that he had to push a button which would start the bell ringing, and that it would continue to ring until another button was pressed, which would stop it; that the bell continued to ring until after the car had stopped on the bridge; that

upon approaching the bridge he blew his whistle. (R. p. 45, 46).

This testimony was supported by the defendant's eye witness Luckey. (See R. p. 59, 60). It was further supported by the testimony of defendant's witness Anderson, who was the conductor of the car (R. p. 63, 64, 65), and also by defendant's witness Taylor, who was one of the operators of the car. (R. p. 67).

He further testified that as the car approached the bridge it was moving at the rate of about six miles an hour, and that the headlight was burning in good order. (R. p. 47, 48).

This testimony was supported by defendant's witnesses Taylor, one of the operators of the car. (R. p. 67, 69).

With reference to the accident he testified as follows:

> "That on the evening of the accident he observed one man on the bridge approaching in the ordinary way. When he first saw him he was distant about 300 feet and was walking towards the car and was in the center of the track; that there was a tin covering between the track. He did not know the man he saw, did not know deceased during his lifetime. The man was walking up and always toward the motor car and he stepped off to one side and that all witness saw was that he turned around and jumped in front as if he was going to make a get-a-way or something and witness imme-

diately applied the emergency air and stopped and did not see anything more of the man. That he applied the emergency air as soon as the man he saw started back away from where he was and that he stopped the car. He did not see anybody hit and did not feel any impact. * * * That he stopped his car as soon as he could after he discovered that the man was attempting to move from his place. As quick as he saw the man moving he threw on all of the air, that is the emergency brake, and stopped the car. * * * That a man could lean against an upright with safety, without the car hitting him. That he supposed the man was safe when he was at this pillar and had no reason to think he was liable to be hit. That this was a common occurrence there on the bridge when people were crossing it. That people were seen there every once in awhile. That the man made some motions from this upright and when he did the witness stopped the car just as soon as he could, (R. p. 48, 49).

That when he first saw men or any man on the bridge on this particular night was when he had just come around the curve and started on the straight piece of track, entered the bridge, he was looking out observing to see if anyone was on the bridge. That was about—he thought—right at the point on the curve at the place where the car came on the straight track so that the headlight showed right on the bridge and this is when he first saw the man far ahead. That he only saw one man. That he was walking towards the car. * * * He walked quite a little way towards the car and finally stepped off towards one side and then he bobbed up again and that was the last he saw of him. (R. p. 54). * * * That if he had stayed where he was he would have been in the clear. He was over to one side.

He naturally supposed the man was going to stay there." (R. p. 55).

The motorman's testimony was in most regards supported by defendant's witness Luckey. (R. p. 59, 62).

Most of our argument addressed to the motion for dismissal of the case at the close of plaintiffs' testimony is applicable to this branch of our argument, and we will not make an additional extended argument on this point.

We cannot conceive of any ground upon which our motion for non-suit was denied, except on the alleged ground that inferences from the plaintiffs' testimony could be drawn to the effect that the motorman should have seen, but did not see, the deceased, or that he did see him and did not exercise reasonable care to avoid injuring him.

Any inferences of this kind which might properly have been drawn from the plaintiffs' testimony, were absolutely disposed of by the uncontradicted testimony of the motorman and other witnesses of the defendant. It will be remembered that the only testimony of the plaintiffs which even tended to show that the bell was not ringing and the whistle was not blown, was the testimony of plaintiffs' one eye witness, who simply said that he did not hear these signals. He did not state that the signals were not given. On the contrary, three or four witnesses for the defendant testified positively that the whistle was blown and the bell was ringing.

It has been correctly held that where witnesses testify that they did not hear the signals given, and other witnesses testify positively that the signals were given, there is nothing to go to the jury on that point.

Rich v. C., M. & St. P. Ry. Co., 149 Fed., 79.

Chicago etc. Ry. Co. v. Andrews, 130 Fed., 65.

Baltimore etc. Ry. Co. v. Baldwin, 144 Fed., 53.

Culhane v. R. R. Co., 60 N. Y., 133.

But it is wholly immaterial here whether these signals were given. The only purpose of them would be to warn of the approach of the car, and since all witnesses admit that the headlight was burning and could be seen by the deceased in ample time to have avoided the injury, there was no need for other signals.

The possible inference from plaintiffs' testimony, that the motorman was at fault in not seeing the deceased, or if he saw, in not stopping his car in time to avoid the injury, is absolutely overcome as above indicated, by the positive testimony of the motorman and other supporting witnesses. The motorman's testimony is, that he was running his car at a very slow rate; that he anticipated some person might be on the bridge; that he was on the lookout, and that he saw the man whom he believes to have been the deceased.

If such be the facts, as in truth they are, then how can it be said that the motorman was in the slightest degree negligent?

III.

REQUESTED INSTRUCTION.

The defendant requested and the court refused to give the following instruction:

> "In view of the fact that all the testimony discloses that the engine in question was lighted by a headlight that could be seen for a long distance you are instructed that the question whether the bell was rung or not on the car just prior to the accident is immaterial in this case and you can not find any negligence based upon the fact that the bell was not rung."

All of the testimony in the case showed that when the motor car got within three hundred feet of the westerly end of the bridge the headlight could be plainly seen clear through the bridge and far beyond. Inasmuch as the only purpose of ringing the bell or blowing the whistle would be to give notice of the approach of the car, it seems to us that the fact that the deceased saw the headlight was amply sufficient warning. To have sounded the whistle and rung the bell would have added nothing to the warning. The plaintiffs offered testimony which had a tendecy to show that neither of these signals were given. The jury might have returned its verdict solely on the ground that these warnings were not given. It was, therefore in our judgment,

the duty of the court to have given this instruction. Certainly it was the law, and we are convinced that the refusal of the court to give the instruction was prejudicial error.

IV.

REQUESTED INSTRUCTION.

The defendant requested and the court refused to give the following instruction to the jury:

> "You are instructed that the fact that the party claimed to have been killed, for a long period of time prior to the accident traveled in the morning to his work over a right-of-way and bridge across the river at some distance from where this railroad bridge was operated is a circumstance which you should consider in determining whether the alleged deceased was guilty of contributory negligence. The testimony discloses that he could go to his work, and did go to his work in the morning by a route over which there were no trains operated, and this being so you have a right to take this circumstance into consideration in determining whether he was guilty of contributory negligence in going upon the bridge where it is claimed he was killed."

That there was ample evidence upon which to base this requested instruction, there can be no dispute.

In determining whether the deceased was negligent in undertaking to cross the bridge at all, and particularly at night, the jury should take into consideration the necessities and conveniences in so

doing. We believe all the courts which have discussed this question support the view announced.

If the railroad bridge was the only means by which the deceased could have gotten from his place of employment to his home, the jury might consider that it was not negligence on his part to walk over the bridge at night. If there was another convenient and less dangerous way, the jury might well determine that the deceased was guilty of negligence in selecting the most dangerous way. By refusing to give this instruction, or any other of similar substance, the court practically gave the jury to understand that under no circumstances would it be negligence on the part of the deceased to walk across this bridge.

Certainly this instruction states the law as announced by all the decisions, and it should have been given.

V.

REQUESTED INSTRUCTION.

The defendant requested and the court refused to give the following instruction:

> "If you believe from the evidence that it was dangerous to undertake to cross over the said bridge at the same time a car or train was crossing over the same and you further believe that the deceased, immediately prior to going on the said bridge, knew or by the exercise of reasonable care should have known that he

would meet the said motor car or other car or trains on such bridge, if he undertook to cross the same at the time he did undertake to cross, then the deceased would be guilty of such contributory negligence and assumption of risk as would defeat any recovery for the plaintiffs herein, and under those circumstances your verdict must be for the defendant."

This instruction went to the very marrow of the question of contributory negligence. The undisputed testimony had shown that the deceased had been walking over this bridge every night, at about 6 o'clock, for at least a year; that all the trains of three large railroad companies were operated over that bridge, and that it was in almost constant use; that for a number of weeks this motor car had its schedule to leave the Hoquiam station at 6 o'clock for Montesano, and that nearly all the time it was operated on time, and that this car would almost invariably, during those number of weeks, pass over the bridge between 6 o'clock and five minutes thereafter. Now if the deceased knew that this car was due to pass over that bridge at approximately the time he was undertaking to pass over it, and he disregarded such knowledge, he certainly would be guilty of such contributory negligence as would prevent any recovery. It cannot be said that a man would be using reasonable care and caution to undertake to cross over this bridge when he knows that in all probability he will meet a train thereon.

There was ample testimony upon which the jury

could find that the deceased knew that he would probably meet this particular car on the bridge, and if the jury had so believed and the court had given this instruction, the jury must of necessity have returned a verdict for the defendant on the ground of contributory negligence. We cannot conceive why the court did not give this instruction. It covered one of the principal features of the case whereby defendant had hoped to win.

VI.

VERDICT.

There was a verdict for $2500 in favor of both plaintiffs. Our contention is that in a case of this character such a verdict is improper and that the court should have required the jury to have returned a separate verdict as to each of the plaintiffs. As it is, it is impossible to tell how much the jury gave to each of the plaintiffs, or whether they intended to give it all to one and none to the other, consequently it deprives the defendant of the opportunity of raising the question of excessive verdict. We may be willing to concede that if the verdict were for equal amount to each of the plaintiffs, it would not be excessive as to either; but if the verdict had been all or nearly all for one plaintiff, we would insist that it was excessive.

In the case of Fogarty v. N. P. Ry. Co., 74 Wash., 397, such a verdict was returned by the jury, and because thereof the Supreme Court of the State of

Washington remanded the case for a new trial. The court, in part, said:

> "It was also error to direct the jury to assess the damages in a single sum. The jury might have found, as between the widow and child, they did not sustain an equal financial loss, or they might have found that one sustained such a loss while the other did not."

In the case of Gulf, Col. & Santa Fe R. Co. v. McGinnis, 228 U. S., 173, (57 Law Ed., 785), the same question arose, where the same kind of a verdict was considered by the United States Supreme Court.

It is true each of the cases above cited was with reference to the Federal Employe's Liability Act, but the reasons given in those cases should be as applicable to the case at bar as to those cases.

The defendants in error may, however, take the position that such a verdict is good as against the defendant if there was no request for a several verdict. But there was in this case that which was equal to a request for a several verdict.

On pages 84 and 85 of the record is contained an instruction by the court which in substance directed the jury to find a joint verdict in favor of the plaintiffs if any verdict at all in their favor was returned. There the court said:

> "The order in which you would naturally take up the consideration of these issues would

> be, first, to determine what, if any, relationship this boy and this woman bear to the deceased. If there is a fair preponderance of the evidence that one was the wife, and is today the widow, and that the other was the son, then the next step would be logically to determine whether the deceased himself contributed in any way proximately to his own death, by his own negligence."

The defendant excepted to this instruction on the ground "that no damages could be awarded to the minor; and also upon the ground that damages could not be united in one verdict for both plaintiffs jointly." (R. p. 96).

At another place the court instructed the jury as follows:

> "If you find that the defendant was so negligent, by a fair preponderance of the evidence, you would then pass to what recovery should be awarded the plaintiffs in this case. In assessing the amount of recovery, you would not be influenced by any sentimental considerations and you would not allow any damage for merely grief, or injury to the feelings which may have resulted from the loss of the parent, but you would confine your verdict to such an amount as would fairly compensate the plaintiffs in this cause for the death of the deceased Penso."

To which instruction the defendant at the time took exceptions in the following words:

> "Upon the ground that no damages could be awarded to the minor, in any event, under the proof in the case; also upon the ground that damages could not be united in one verdict for both plaintiffs jointly." (R. p. 96, 97).

It will thus be observed that the defendant objected to a joint verdict and in substance requested a several verdict as to both plaintiffs.

We respectfully submit that the judgment of the lower court should either be reversed and the cause ordered dismissed, or be reversed and remanded for a new trial.

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